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WHEN DOES AN INJURY ARISE "OUT OF" A SERVANT'S EMPLOYMENT?—Workmen's Compensation Acts have given rise to many nice questions as to the meaning of many terms used in the statutes, and the decisions on such questions have unfortunately, not always been uniform or even reconcilable. A recent English case *Parker v. "Black Rock" (Owners,)* [1914] 2 K. B. 39, 83 L. J. K. B. 421, presents a question which has been one of peculiar difficulty for the English courts. The facts and decision of the case are as follows:

A fireman was engaged on a ship under articles in which the Board of Trade scale of diet was struck out and "Crew to furnish their own provisions" was inserted. The crew had to leave to go ashore to buy food when necessary. When the ship was in port moored alongside a pier the fireman went ashore, bought provisions, and while returning at night direct to his ship fell into the water somewhere off the pier and was drowned. While he was away the ship had moved to another pier. The night was dark and a heavy gale was blowing. Held (COZENS-HARDY, M. R., and EVE, J.; Sir Samuel EVANS, P., dissenting), upon the construction of the articles that there was no express contract by the deceased to provide himself with provisions and that no such contract could be implied; that the deceased was about his own business and not about the ship's business; and that the accident did not therefore arise "out of" the employment within section 1, sub-section 1 of the Workmen's Compensation Act, 1906.

The question for decision was whether the accident which caused the death of the appellant's husband arose "out of" his employment, as it was not contended that it did not arise "in the course of" his employment. The apparent basis for the majority opinion was that there was no contractual obligation by the deceased fireman towards the ship owners that he would provide his own provisions; that in going ashore to order provisions the man was only acting in his own interest and for his own purpose. In meeting this objection the dissenting opinion observes—"In one sense his buying of provisions was his own business; but in another, and a very real, sense it was part of the ship's business that he should procure the food necessary to enable him to do his work as one of the crew, and so perform his share in the work without which the ship's voyage could not be completed or continued. His employment was continuous during night and day, on board and on shore, unless he travelled outside the employment for purposes foreign to it. * * * If there was no such express contract by him, such a contract would be implied. But whether there was such a contract, express or implied, or not, it was a natural and a necessary incident of his employment that the seaman should provide his own food; and in going on shore to purchase it, and in returning to the vessel after doing so, he was doing a thing which was not only incidental, but essential to his employment, and without which his employment and his work as one of the ship's crew would come to a speedy and unhappy end." Sir Samuel EVANS, President, then proceeds to show that the insertion "Crew to provide their own provisions" was a contract between the master and the crew and gave rise to an obligation on the part of the crew to furnish their own food.

Without disputing the correctness of the decision on the question of whether there was or was not a contract, express or implied, (and such seemed to be the determining factor in the controversy), it is hardly possible to reconcile the opinion with preceding authority on analogous situations. As Lord LOREBURN remarks in the case of *Kitchenham v. "Johannesburg" Steamship*, 80 L. J. K. B. 313; "out of and in the course of the workman's employment are words which admit of inexhaustible varieties of application according to the nature of the employment and the character of the facts proved. The facts in different cases are infinitely different; and if we were upon each argument to discuss them and to differentiate one from another, judgments in Courts of law would be interminable and would lead rather to confusion than to enlightenment." And from a survey of the English cases on the subject it is just this attitude which has been taken by the courts and in differentiating facts and peculiar circumstances have reduced the law to a state of chaos and conflict, which statement will be supported by an inspection of a few of the recent cases.

In *Moore v. Manchester Liners, Lim.*, [1910], A. C. 498, a fireman on board a steamship lying off South Brooklyn went on shore for the purpose of obtaining for himself certain necessities which were not provided by the owners of the ship. On returning to the ship he fell off a ladder, which was the only means of access from the dock to the ship, and was drowned. It was held by the House of Lords that the accident arose out of and in the course of his employment and therefore the widow was entitled to compensation. The court said; "Moore left the ship for the purpose of obtaining goods which enabled him to carry out his employment; surely an accident occurring during the absence for such purpose arose out of the employment." The only possible distinction between this and the principal case is that in the former the seaman was in the act of getting on the ship by the only possible means of access, while in the latter it was not proved that he had ever reached the ship. There are two arguments to dispel this distinction; first, in the principal case the ship had been removed from the position in which it was when the employee left; and second, Lord Justice Fletcher Moulton in the *Moore* case, *supra*, said; "I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shown that when the sailor returned to the ship there was a dense fog and that in trying to find the gangway he fell in the water and was drowned, I think that the accident would arise out of his employment."

In *Jackson v. General Steam Fish. Co.*, [1909], A. C. 523, a workman was employed to watch trawlers as they lay in a harbor. He was on duty for twenty-five hours, during which time he had to provide his own food, and in connection with his duties it was occasionally necessary for him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats and went to a hotel near at hand for some refreshment. He was absent a very short time, and returned to the quay, and while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. It was held by the House

of Lords that the accident arose out of and in the course of the man's employment and that his dependent was entitled to compensation. See also *Kearan v. Kearan*, 45 Irish L. T. 96; *Keyser v. Burdick & Co.*, [1910], 4 B. W. C. C. 87.

In *Robertson v. Allan Bros. & Co.*, [1908], 98 L. T. 821, a steward of a steamship which was lying at a port went on shore in the evening as he was permitted to do. Returning to the ship late in the evening, as was alleged in a state of intoxication, he attempted to board the ship by using the cargo skid or stage, instead of the gangway. In doing so he slipped and fell and received injuries for the effect of which he died. It was held that the injury arose out of and in the course of the employment.

These cases suffice to show that although as a general proposition the time while a man is going to and from his work is no part of his employment, there are enough exceptions to this principle to make it a pregnant source of controversy. In one of the cases cited by the court in support of the decision in the principal case, the second engineer of a steam trawler, which was in dry dock at the time, went ashore to his home for dinner. As he returned to the ship he fell into a dry dock and was killed. It was held that the accident did not arise out of and in the course of his employment. *Gilbert v. "Nizam" Steamship*, 79 L. J. K. B. 1172. The court observed—"I decline to assent to the view that a ship is in a different position from a factory for this purpose. This is a simple case where a man has been to his home to get his dinner, and has met with an accident on his way back to the scene of his labors." See also *Hewitt and Others v. "Duchess" Owners*, [1910], 120 L. T. 204. Yet it can readily be seen that there is an essential difference where a ship is in a dry dock and where it is on an ocean voyage; in the first case it is not within the course of the employment to take one's meals on shipboard because of the very position of the ship, while in the latter case, from the very nature of the employment, it is contemplated by both master and servant that the necessary meals are to be partaken on board. And moreover in the *Moore case*, *supra*, Lord Justice Fletcher Moulton, in referring to the nature of the employment of a seaman on an ocean voyage, says;—"His employment is continuous and there is no moment when he, either on board or on shore, is not bound to obey the captain's orders." It logically follows that if the seaman is subject to the commands of the captain even when he is on shore, and he is doing nothing unlawful, then he must be subject to the rights and obligations of his employment, if engaged in an act incidental to such employment, and it surely cannot be denied that the acquisition of necessary provisions is at least incidental to the employment.

The only cases which seem to support the principal case are those where the employee went ashore for his own purposes, or more precisely for purposes in no way connected with or incidental to the employment. The present case is more strongly in favor of the applicant than any of these cases for the reason that the deceased fireman went ashore in pursuance of a duty arising either under an express or implied contract, or at any rate a duty not only to himself, but to his employers as well, the performance of which

was essential to his engagement. As the dissenting judge remarked, it is immaterial whether the accident happened to the deceased while on the quay in approaching the steps, or while on the steps in approaching the berth, or on a gangway which he had reason to believe was there to form an access to the ship, or while attempting from the steps to reach such a gangway, or to get on to the ship. The danger he ran in approaching the ship at the end of an unprotected pier on such a night, and which proved fatal to him, was a danger incidental to his employment; he encountered the danger in the course of his employment; and in encountering it the accident which befell him *arose out of his employment*. For a discussion of a question arising under the Massachusetts Act, see 12 MICH. L. REV. 614.

H. W. L.